# Recalling the Pentagon Papers Case, 50 Years On (Part Four)

May 12, 2021 **by Dan McCue**

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SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

Nixon Says Turks Agree To Ban the Opium Poppy

By JOHN HERBERS

WASHINGTON, June 30— President Nixon announced today that Turkey had agreed to eliminate within a year her production of opium poppies, which accounts for about two-thirds of the illegal heroin reaching the United States.

Mr. Nixon, in a brief announcement delivered in the White House press room, said that as a result of negotiations between the United States and Turkish Governments, Premier Nihat Erim had agreed to ban altogether the cultivation of opium poppies by June, 1972.

He said the joint announcement, made simultaneously in Washington and Ankara, "represents by far the most significant breakthrough that has been achieved in stopping the source of supply of heroin in our worldwide offensive against dangerous drugs."

Two weeks ago, Mr. Nixon sent a message to William J. Handley, the United States Ambassador in Turkey, saying that the time for talk had passed and the United States must have action by the Turkish Government in ending poppy cultivation.

Today, the President praised Premier Erim for "courageous, statesmanlike action" and said the United States would provide money and technical assistance in helping Turkish farmers shift to other crops.

Officials would not say how much American money would be involved, but the United States has made a $3-million commitment to Turkey on the heroin problem.

Secretary of State William P. Rogers, who helped work

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Soviet Starts an Inquiry Into 3 Astronauts' Deaths

By BERNARD GWERTZMAN

PRESIDENT CALLS STEEL AND LABOR TO WHITE HOUSE

He Asks Both Sides to Meet With Him Tuesday Before Contract Talks Start

By PHILIP SHABECOFF

WASHINGTON, June 30 — President Nixon has called negotiators of the steel companies and steelworkers union to meet with him next Tuesday before they sit down to begin contract negotiations, a White House spokesman announced today.

It will be the first time that the President will have met with labor and management in any industry prior to nationwide contract negotiations, according to Ronald L. Ziegler, the White House press secretary.

Discussion Issues Listed

Mr. Ziegler said that the President had called the meeting to discuss general economic developments and trends in the world steel markets.

Earlier today, the chairman

Pentagon Papers: Study Reports Kennedy Made 'Gamble' Into a 'Broad Commitment'

By HEDRICK SMITH

The Pentagon's study of the Vietnam war concludes that President John F. Kennedy transformed the "limited-risk gamble" of the Eisenhower Administration into a "broad commitment" to prevent Communist domination of South Vietnam.

Although Mr. Kennedy resisted pressures for putting American ground-combat units into South Vietnam, the Pentagon analysts say, he took a series of actions that significantly expanded the American military and political involvement in Vietnam but nonetheless left President Lyndon B. Johnson with as bad a situation as Mr. Kennedy inherited.

"The dilemma of the U.S. involvement dating from the Kennedy era," the Pentagon study observes, was to use "only limited means to achieve excessive ends."

Moreover, according to the study, prepared in 1967-68 by Government analysts, the Kennedy tactics deepened the American involvement in Vietnam piecemeal, with each step minimizing public recognition that the American role was growing.

The expansion of that role, over three decades, is traced in the 3,000 pages of the Pentagon's study, which is accompanied by 4,000 pages of documents on the Vietnam era. Previous articles in The Times's presentation of this material have recounted President Johnson's movement to war in 1964 and 1965.

President Kennedy made his first fresh commitments to Vietnam secretly. The Pentagon study discloses that in the spring of 1961 the President ordered 400 Special Forces troops and 100 other American military advisers sent to South Vietnam. No publicity was given to either move.

Small as the numbers seem in retrospect, the Pentagon study comments that even the first such expansion "signaled a willingness to go beyond the 685-man limit on the size of the U.S. [military] mission in Saigon, which, if it were done openly, would be the first formal breach of the Geneva agreement." Under the interpretation of that agreement in effect since 1956, the United States was limited to 685 military advisers in Vietnam. Washington, while it did not sign the accord, pledged not to undermine it.

On May 11, 1961, the day on which President Kennedy decided to send the Special Forces, he also ordered the start of a campaign of clandestine warfare against North Vietnam, to be conducted by South Vietnamese agents directed and trained by the Central Intelligence Agency and some American Special Forces troops. [See text, action memorandum, May 11, 1961, Page 3.]

The President's instructions, as quoted in the documents, were, "In North Vietnam . . . [to] form networks of resistance, covert bases and teams for

The Times today resumes its series of articles on the Pentagon's secret study of the Vietnam war. The study was obtained through the investigative reporting of Neil Sheehan, and the articles were researched and written over three months by Mr. Sheehan and other staff members. The fourth and fifth articles, both by Hedrick Smith, are published today and form an account of decisions in the Kennedy Administration.

Three pages of documentary material covering the Kennedy policy begin on Page 3, and documents on the 1963 coup begin on Page 9. A summary of the three earlier articles, covering the Johnson Administration, appears on Page 15.

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BURGER DISSENTS

First Amendment Rule Held to Block Most Prior Restraints

Decision, concurring opinions, dissents start on Page 17.

By FRED P. GRAHAM

WASHINGTON, June 30 — The Supreme Court freed The New York Times and The Washington Post today to resume immediate publication of articles based on the secret Pentagon papers on the origins of the Vietnam war.

By a vote of 6 to 3 the Court held that any attempt by the Government to block news articles prior to publication bears "a heavy burden of presumption against its constitutionality."

In a historic test of that principle — the first effort by the Government to enjoin publication on the ground of national security — the Court declared that "the Government has not met that burden."

The brief judgment was read to a hushed courtroom by Chief

The Supreme Court hands The New York Times and the press at large a major victory.

*(This is the fourth and final part of a four-part series. The first three parts can be read **here**, **here** and **here.**)*

## The First Amendment Prevails

The Supreme Court's decision in the Pentagon Papers case, officially, *New York Times Co. v. United States*, affirmed historical precedents supporting freedom of the press against prior government restraint.

But heading into oral arguments, Floyd Abrams and Alexander Bickel were feeling anything but sure of their chances.

The court was in a period of transition. Chief Justice Earl Warren, who had led the high court through a relatively liberal period, had

decided to retire in 1968, hoping President Lyndon Johnson would pick his successor.

Johnson did, in fact, pick Justice Abe Fortas to be the next chief justice, and nominated U.S. Circuit Judge Homer Thornberry to replace Fortas as justice.

The plan unraveled when it was learned that Fortas had entered into a secret lifetime contract paying him $20,000 a year to provide private legal advice to Louis Wolfson, a friend and financier in deep legal trouble.

Warren immediately asked Fortas to resign, which he did, and Thornberry's nomination to the court was moot.

By the time the dust settled, Richard Nixon was president and he had chosen the conservative U.S. Circuit Judge Warren Burger as the next chief justice.

In an email to The Well News, Abrams said the short answer to the question of how he and Bickel felt the morning of oral arguments, is "exhausted."

"The responsive answer is that we were confident we have four votes and hopeful of one or two more, but uncertain," he said.

With the center of gravity on the court shifting to the right, the four justices the two attorneys had confidence in were Hugo Back, William Brennan, William O. Douglas, and Thurgood Marshall.

That meant he and Bickel were hoping to win over justices Potter Stewart and Byron White.

"Victory was by no means assured," Abrams said.

When the decision finally was handed down, on June 30, 1971, it was read to a hushed courtroom by Chief Justice Burger at a special

The Supreme Court as it was comprised from 1970-1971. Seated from left are Justices John Marshall Harlan II and Hugo Black, Chief Justice Warren E. Burger, and Justices William O. Douglas and William J. Brennan, Jr. Standing are, from left, Justices Thurgood Marshall, Potter Stewart, Byron R. White, and Harry A. Blackmun. (Photograph by Robert S. Oakes and Vic Boswell, National Geographic, Courtesy of the Supreme Court of the United States.)

session called just three hours before. The main opinion was brief and to the point.

"The United States, which brought these actions to enjoin publication in The New York Times and in The Washington Post of certain classified material, has not met the 'heavy burden of showing justification for the enforcement of such a [prior] restraint,'" it said.

It was accompanied by six concurring opinions and three in dissent. The lawyers for the newspapers had lost only Burger and justices John Marshall Harlan and Harry Blackmun.

Six of the nine members of the court concluded that on the factual record before them, the government had failed to meet its "heavy burden" of justifying a prior restraint on publication — the very language of the per curiam opinion.

Of the six, four of the justices agreed they were so persuaded of the inadequacy of the government's position that they would have ruled for The Times without any need for oral argument.

"It should be noted at the outset that the First Amendment provides that 'Congress shall make no law … abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press," Douglas wrote.

"Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions, there should be 'uninhibited, robust, and wide-open' debate," he said.

"The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise," Brennan wrote. "The entire thrust of the government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways.

"But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result," he said.

"I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment," Black wrote in his concurrence.

Later, he added, "In my view, it is

The New York Times' former headquarters at 229 West 43rd Street in midtown Manhattan. (Photo via Wikimedia Commons)

unfortunate that some of my brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."

Black continued: "Our government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are

asked to hold that the First Amendment does not mean what it says, but rather means that the government can halt the publication of current news of vital importance to the people of this country.

"In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. … Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

"In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly," Black concluded.

The justice was no doubt pleased then, when the Times won the Pulitzer Prize for public service in 1972 for its Pentagon Papers coverage.

The three dissenting members of the court agreed with the general proposition that prior restraints against the press were rarely to be permitted.

However, Harlan, in an opinion joined by Burger and Blackmun, not only objected to the "almost irresponsibly feverish" pace at which the case proceeded through the courts, but also suggested that the judgment of the executive branch as to the potential harm to the conduct of foreign relations caused by publication should, in most circumstances, be deemed governing.

## Why It Still Matters

The immunity from censorship enshrined in the Pentagon Papers decision has reverberated in Washington, D.C., and beyond ever since.

In essence, it tilted the balance of power between the government and the media to the media's side.

From the June day the decision was handed down, a thumb has rested squarely on the pan or plate of the scale marked factual reporting — very much to the detriment of the government's insistence on secrecy.

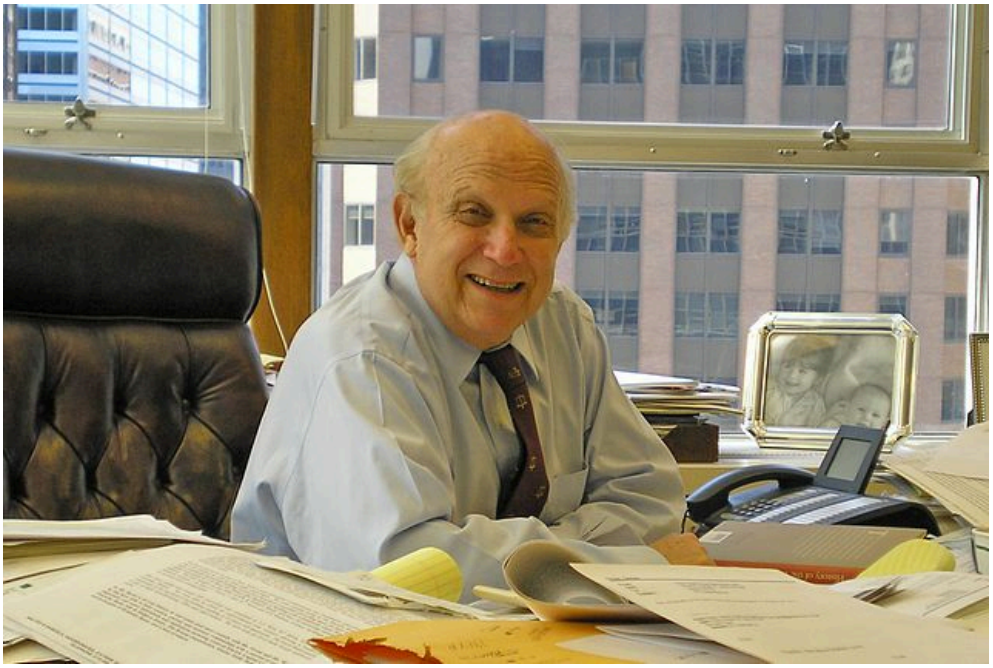
From then to now, the decision to publish has rested solely with the owners and editors of newspaper and media outlets.

It is a reality that has inspired many a lawmaker — and particularly many in the national security establishment — to bristle ever since.

That the precedent has lasted so long is almost nothing short of a miracle. In the 50 years since the court handed down its ruling, there has not been another instance of officially sanctioned prior restraint to keep an American newspaper from printing secret information on national security grounds.

That would have been consolation to Bickel, who even after winning the case, remained troubled that Nixon had tried to stop publication at all.

Prior to his death in November 1974, just three years after arguing the Pentagon Papers case, Bickel would write that the "law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure."



Floyd Abrams in his office. (Photo by David Shankbone via Wikimedia Commons)

Critics of the Pentagon Papers ruling point to it as the beginning of a period of press militancy that continues unabated to this day, an era when every young journalist dreams not of producing stories, but of "speaking truth to power."

Marcus Brauchli, a former executive editor of The Washington Post and managing editor of The Wall Street Journal, once observed that the justices in the majority had done little more than establish the understanding "you could publish anything you could lay your hands on and no one could stop you."

Other critics have said the case helped fuel the notion that unless the relationship between the press and the government is adversarial, it is somehow corrupted.

And in a bit of irony, both Ellsberg and Nixon have suggested that the Pentagon Papers case led to a torrent of future leaks and a greater reliance by many publications on unnamed sources.

But for others, the Supreme Court ruling in the Pentagon Papers case will always be seen as a watershed moment in American — and journalistic jurisprudence.

The late Thomas Emerson of Yale Law School, a man known alternately as a "major architect of civil liberties law" and "the foremost First Amendment scholar of his generation," once wrote that a contrary result — a ruling against the press — "would have been a disaster."

"It would have made the press subject to a very considerable extent of advance restriction. It would have changed the whole relationship between the press and the government."

In an affidavit submitted during the legal wrangling over the right to publish, Frankel, later to be The New York Times executive editor but then chief of its Washington bureau, observed that without the use of "secrets" there simply could not be the kind of fact-based, in-depth political, diplomatic or military reporting that American citizens take for granted today.

"Practically everything that our government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information," Frankel wrote.

"The government hides what it can, pleading necessity as long as it can, and the press pries out what it can, pleading a need and right to know. Each side in this 'game' regularly 'wins' and 'loses' a round or two. Each fights with the weapons at its command," he said.

The case also illustrated that judicial bans on publishing are largely, if not totally ineffective. All of the temporary restraining orders

issued in the Pentagon Papers case failed to prevent Ellsberg from continuing his distribution of the documents.

John Ehrlichman and H.R. Haldeman on April 27, 1973, three days before they were asked to resign. (Photo via Wikimedia Commons)

During the period in which The Times was enjoined from publishing the documents, Ellsberg made them available to nearly 20 others. The Nixon administration brought actions for injunctive relief against three of them, but not the others.

At one point in the legal proceedings, when a request to block The Washington Post's publication of the papers was before the U.S. Circuit Court for the District of Columbia, U.S. Circuit Judge Roger Robb expressed some frustration at what the court was being asked to do.

Suppress a story in the Times, and it pops up in the Washington Post. Censor it out of the Washington Post, and there it is in the

Boston Globe.

“Would you be asking us to ride herd on a swarm of bees?” Robb asked Solicitor General Erwin N. Griswold.

In a Notes and Comment piece, published in the New York magazine, writer Jonathan Schell observed, “The question is, ‘Who has a right to define the public interest?’ In a democracy, it is supposed to be the public.

“A democracy has no place for men who think it is up to them to betray the public in the name of interests that the public is supposedly too foolish to recognize,” he continued. “The secrecy that prevented the world from discovering what was going on within the councils of policy seems to have also prevented the men within them from seeing out.”

And thus, it remains. Fifty years on.

“In a sense, the case is so durable precisely because of its fame,” Abrams said in an email to The Well News. “It has come to stand for something a lot broader than that prior restraints on speech are extremely difficult to sustain.

“Because the case was commenced by the president of the United States against the nation’s greatest newspaper in the midst of an ongoing war, it has come to stand for some broader, if familiar, propositions: that even the president cannot stop the press from reporting on the most controversial topics; that free speech must remain free even during wartime; that the press has a constitutionally protected role to play even during the most difficult times; and that the Supreme Court has a major and indispensable role to play in ensuring that the nation remains free.”

According to Ken Paulson, director of the nonpartisan and nonprofit Free Speech Center at Middle Tennessee State University,

*New York Times v. United States* "is arguably the second most important free press case in American history, eclipsed only by *New York Times v. Sullivan*."

"The decision could have been written with greater clarity, but it certainly creates a strong presumption that prior restraint of news organizations would violate the free press clause. It also recognized the importance of a vigilant press in keeping government malfeasance in check," he said.

Paulson went on to say he believes too few journalists recognize, or truly appreciate, those pivotal moments in judicial history that made possible the kind of accountability journalism we have today.

"*Times v. Sullivan* gave journalists the right to make mistakes when writing about public officials and public matters, making it much safer for journalists to pursue investigative work, while the Pentagon Papers case reinforced the principle that the government can't stop publication, even if the story is based on government leaks," he said.

"The two decisions in tandem have undoubtedly fueled leaks and the use of leaks, but journalists still need to exercise due diligence, and act in good faith and in the public interest."

Asked what he thought of how Sheehan got the Pentagon Papers, Paulson admitted he was "very much surprised" by the reporter's revelation that he'd taken them without permission.

"That was clearly unethical conduct and should have been dealt with as a disciplinary matter," he said.

"That said, the information was of critical importance to the American public and the tainted process didn't undermine the credibility of the documents themselves. The Times and Post did what they needed to do," he added.

Danielle McLean, Ethics Committee Chair for the Society of Professional Journalists, also has mixed feelings about the Pentagon Papers and how Sheehan went about bringing them to the public's attention.

"I think Neil Sheehan should have been truthful and more transparent with Ellsberg about copying the papers and his intent to move forward with the story," McLean said in an email to The Well News. "According to the [SPJ] Code of Ethics, Reporters should be careful when making promises and keep the promises that they make. I think Sheehan's actions breached the trust Ellsberg had given him. In this case, Ellsberg's trust in Sheehan could have cost him his life."

She added: "The Pentagon Papers paved the way for whistleblowers and government or government contracting sources to work with reporters and expose sensitive information that is critical to the public's right to know. The Pentagon Papers allows reporters to seek the truth without fear of reprisal. It ensured that the government cannot operate in secrecy, even in a time of war. Over the past decade, retaliation against whistleblowers has grown. It is important that we remind young journalists and the public about the significance of the Pentagon Papers and why strong shield laws are needed not just for reporters but whistleblowers as well."

On Sheehan's conduct, Abrams held a similar view, "I don't think it lessens the importance of the case or the value of his journalistic accomplishment."

"As for the rest, since Dan Ellsberg has forgiven him, why shouldn't we?" he said.

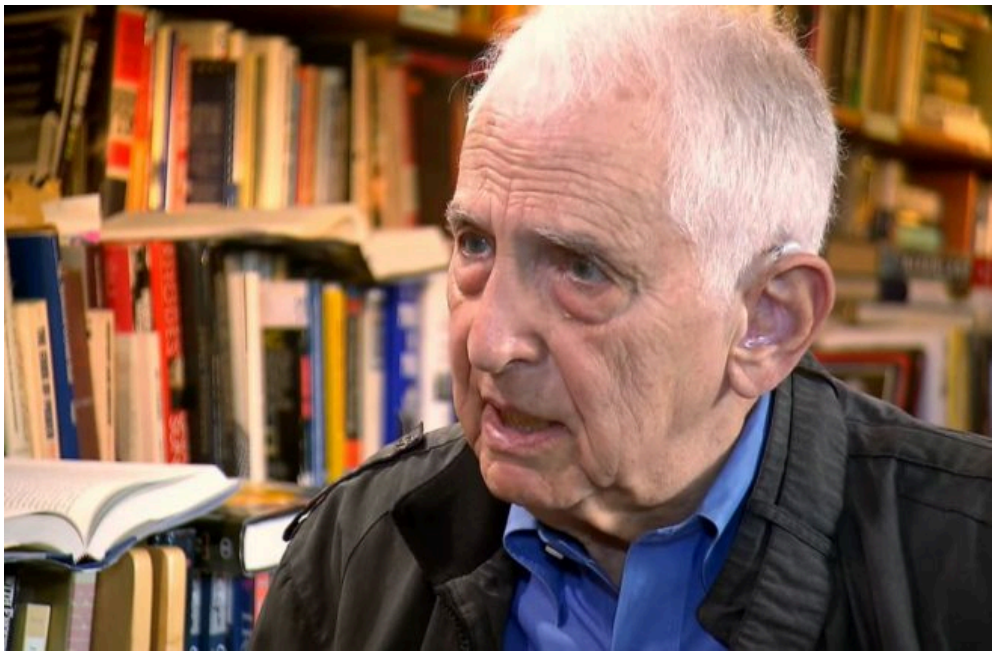
## Postscript

Daniel Ellsberg turned himself in on June 28, 1971, two days before the Supreme Court ruling.

In an appearance in the federal court in Boston, he admitted giving the documents to the press, saying he felt, "as an American citizen, as a responsible citizen," that he could "no longer cooperate in concealing this information from the American public.

"I did this clearly at my own jeopardy and I am prepared to answer to all the consequences of this decision," he said.

Ellsberg's surrender did nothing to calm President Nixon, who ordered aides to "destroy" Ellsberg and told them "I don't care how you do it."



Daniel Ellsberg during a television interview in the late 2000s. (Screen grab from YouTube 2008)

In one White House recording, Nixon is captured telling his chief of staff, H.R. Haldeman, "You can't drop it. You can't let the Jew steal that stuff and get away with it, you understand?"

"Use any means. Is that clear?" he said.

Within a week, a covert Special Investigations Unit was established at the White House. Informally known as "the plumbers," their one and only task was to stop or respond to the leaking of classified information, such as the Pentagon Papers, to the news media.

Their first order of business — silence Ellsberg.

In August 1971, David Young, a special assistant to the National Security Council and Egil Krogh, a deputy to Ehrlichman, met with ex-FBI and CIA agents G. Gordon Liddy and E. Howard Hunt in a basement office of the Old Executive Office Building.

During the meeting, Hunt and Liddy recommended carrying out an operation whose ultimate aim was to call Ellsberg's mental state into question and thereby discredit him. The plan was to break into the office of Ellsberg's psychiatrist and steal any damning material that could be found in his medical files.

The burglary, approved by Ehrlichman on the condition it was not traceable, was carried out on Sept. 3, 1971. The plumbers found Ellsberg's file, but nothing in it that was compromising. The bungling burglars ultimately left the file in a heap on the doctor's floor.

Ellsberg and a co-defendant, fellow Rand Corporation employee Anthony Russo, who had helped him spirit away the copied files, went on trial in Los Angeles on Jan. 3, 1973.

They were charged with violating the Espionage Act of 1917, and on several counts of theft and conspiracy. If convicted, Ellsberg faced 115 years in prison; Russo, 35.

Initially, Ellsberg, by now a household name and a celebrity of the anti-war movement, wanted to claim the documents were illegally classified to keep their contents from the American people.

However, U.S. District Judge William Matthew Byrne Jr. ruled the argument was irrelevant and his attorney struggled for weeks to mount a defense.

As it happened, the plumbers were in a whole other kind of trouble. At about the same time that the Ellsberg trial got underway, the first trials related to the break-in at Democratic Committee Headquarters were beginning– and the key players were, again, G. Gordon Liddy and H. Howard Hunt.

In mid-April 1973, near the end of Ellsberg's trial, Watergate prosecutors discovered not just the burglary of Ellsberg's psychiatrist's office, but evidence of a full-blown campaign against him, including warrantless wiretaps, and profiling by the CIA that violated the agency's charter.

These first Watergate crimes linked directly to the White House. On April 30, 1973, desperate to save his presidency, Nixon fired Ehrlichman, Haldeman, Richard Kleindienst, and John Dean, who had been four of his top aides.

All would later be convicted of crimes related to Watergate. Egil Krogh later pleaded guilty to conspiracy, and White House counsel Charles Colson pleaded no contest for obstruction of justice in the burglary.

Judge Byrne initially received word of the break-in of the psychiatrist's office and shared the information with Ellsberg's defense team.

Two weeks later, the evidence of illegal wiretapping was revealed in court, and Byrne lambasted the prosecution for failing to tell the defense of the illegal recordings in its possession.

Then the judge himself made an admission: he had personally met twice with Ehrlichman, who offered him directorship of the FBI.

Byrne said he refused to consider the offer while the Ellsberg case was pending. Nevertheless, on May 11, 1973, he dismissed all charges against Ellsberg and Russo.

"The totality of the circumstances of this case which I have only briefly sketched offend a sense of justice. The bizarre events have incurably infected the prosecution of this case," he said.

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